

HAMILTON ZONING BOARD OF APPEALS

MINUTES OF MEETING

April 5, 2016

Members Present: Bill Bowler (Chairman), Kim Dietel, Bruce Gingrich (Alternate), and John Rodenhizer.

This meeting was called to order by Bill Bowler at 7:30 pm with a quorum established.

Approve Minutes

Motion to approve the minutes of December 7, 2017 made by John Rodenhizer.

Seconded by Bruce Gingrich.

Vote: Unanimous to approve.

Motion to approve the minutes of March 15, 2017 made by John Rodenhizer.

Seconded by Kim Dietel.

Vote: Unanimous to approve.

Sign Permit Application Submitted by Institution of Savings 545 Bay Road. Temporary Banner Display April 2017 to June 15, 2017. Under ZBL Section 6.E.2.

Richard Nylen distributed a package of information and noted the construction process, which would be finished in the end of June. The bank planned to open in July. Mr. Nylen recalled that he had contacted the Building Inspector, who said the banner was acceptable, so a banner was put up. A complaint caused Mr. Nylen to investigate the By-law which discussed signs that would be up for less than a year and were larger than 2' x 3'. The banner was being hung for a short amount of time. Mr. Nylen believed the jurisdiction was under the Zoning Board of Appeals.

The temporary sign did not impede sight lines, but was just applied onto the chain link fence. Bill Bowler stated that he had conferred with Town Counsel who agreed that this was the proper section that applied to the banner. Mr. Bowler wondered if the matter required publication but Town Counsel opined that it did not as it was a permission not a special permit. Mr. Bowler thought it was properly filed and noticed. Kim Dietel asked if there was a size limit because the sign was for less than one year, to which Mr. Bowler responded that it was under the purview of the Board to allow for larger signs as "other and larger signs." John Rodenhizer thought it was large but helped cover up the construction site.

Ed Howard (Myer Lane) said he filed the complaint and wondered at what point a temporary sign became a permanent sign. Bill Bowler responded that according to the Section, permission would not exceed one year. Mr. Bowler said if the sign were to remain after one year, it would need a variance. Mr. Bowler explained that the Selectmen approved banners as they were installed on Town-owned property. Mr. Bowler said he thought he was agreeable to the proposal.

Motion to grant permission to the applicant, Institution for Savings, to put up a temporary banner as shown in their submittal for a period beginning April 6, 2017 and ending on the earlier of the fence coming down or June 15, 2017 made by John Rodenhizer.

Seconded by Kim Dietel.

Vote: Unanimous to approve.

Mr. Nysten noted that the stone and beams from the Hamilton Gardens building were included as part of the lobby of the new bank. Bill Bowler announced that he would file the Decision based on the motion but the banner could be hung on April 6, 2017.

Public Hearing to Consider Appeal Filed with the Town Clerk by the Town of Hamilton Planning Board on the Letter Issued by the Town of Hamilton Building Inspector that Stated a Cease and Desist Order Would Not Be Issued for the Mixed Use Project at 227 Willow St. (Map 55/Lot 235).

Bill Bowler said he received a letter from Mark J. Lanza, counsel for the builder, CAM Holdings, LLC, dated March 29, 2017, noting his view why the ZBA did not have jurisdiction over the appeal. A memorandum from Town Counsel was received, which was subject to attorney client privilege. Mr. Bowler asked to waive the attorney client privilege in an effort to discuss the issue.

Motion to waive the attorney client privilege with respect to a memorandum from Donna Brewer, dated April 4, 2017, regarding 227 Willow St. made by John Rodenhizer.

Seconded by Kim Dietel.

Bill Bowler wanted to create a clear record in the event that the matter went to a higher appeal.

Vote: Unanimous in favor.

According to Bill Bowler, Attorney Brewer responded to the applicant's counsel's letter taking the position that the ZBA had the authority to hear the appeal. Mr. Bowler read a portion of the letter into the record. The letter noted that if it was assumed that the Planning Board and others might have missed certain arguable deadlines, the Town could still raise the issue. The letter referenced MGL Section 40A, Section 7, indicating that the Building Inspector could bring an action within six years. Mr. Bowler and other members of the Board found Town Counsel's argument in this case persuasive, which allowed them to go forward with the hearing. Both letters would be part of the record.

Bill Bowler stated that the Board was called upon to decide the issues to include the January 20, 2017 letter from the Planning Board to Charles Brett, Building Commissioner, requesting a Cease and Desist Order based on two points: 1) The Zoning By-law Section 5.I.9.B.1, which permitted heights above 35' to include, "spires, water tanks, communications towers, chimneys, exhaust stacks, flagpoles, mechanical penthouses, and other structures normally built above the roof and not devoted to human occupancy." The Planning Board was of the opinion that the vestibule elevator shaft was devoted to human occupancy, therefore it was not permitted above

the 41' height authorized by the Planning Board, and 2) While the Planning Board understood that the special permit may have been constructively granted since no written decision had been filed with the Town Clerk, the applicant may only construct a structure consistent with the final schematics. The vestibule elevator shaft was not shown on the final schematics. It did not constitute the type of structure that may be omitted from schematics. The vestibule elevator shaft was not permitted even if the Willow Street Overlay District Special Permit was constructively granted.

The letter of January 25, 2017 indicated that Mr. Brett declined to issue the Cease and Desist Order on those two points, to which the Planning Board appealed that decision causing the hearing to take place. This Board would deal with the limited issues: 1) Did the elevator shaft come within the section of the By-law quoted and 2) should it have been shown on the final schematics approved by the Planning Board and what was the effect of that.

Bill Bowler offered his surprise that there was no one from the Planning Board to present the case. Ed Howard, who was present and a member of the Planning Board, said the applicant came with the initial application that the Planning Board ruled on to include the 41' because the applicant presented a view of the roofline. Mr. Howard said the extra 6' was voted upon to accommodate the flat roofline and currently there was an elevator shaft that went considerably higher than what was presented as a mechanical room for human occupancy above that level.

Ed Howard said the building, as it stood currently, was not what Mr. Howard voted upon. The September 13, 2014 plan featured three elevations of the building with Mr. Howard's signature upon it. John Rodenhizer said a roof deck was not on the plan. The Decision had the height of 41'. Mr. Howard had not seen the Building Permit plan until recently, which opened up a fourth floor for human occupancy. There was additional space in the elevator area. The fourth floor appeared to be in the latest, July 02, 2016, Building Permit Plan.

It was noted that when an applicant obtains a building permit, they do not return to the permitting authority for approval. The current height of the elevator shaft was 57', not 41'. Mr. Howard said the structure on the plan was larger than an apartment.

Michael Pallazola (applicant) said the Special Permit plan was clearly indicating the flat roof at 41'. Originally it was 45' to match the rear building. Mr. Pallazola said the Planning Board approved 47' due to the mansard roof. John Rodenhizer responded that the mansard roof was no more than 3'. Mr. Pallazola said the permit set and the building permit set were identical.

Bill Bowler said the Planning Board gave itself the permitting authority under the Overlay District, not under Subdivision Control, so the process would be to follow the rules of the Zoning Board, which included closing the hearing, having a vote, writing and filing a decision within 14 days, which was not completed. After filing with the Town Clerk, there would be a 20 day appeal period. The Planning Board did not file the Decision with the Town Clerk, therefore,

under zoning procedures, the permit was constructively granted because the time went past the allowable timeframe. Mr. Bowler said in his view, the overlay district should have gone on top of the Site Plan Review Section and this plan did not come close to what was required under Site Plan Review.

John Rodenhizer thought both the Planning Board and the applicant dropped the ball. The Planning Board set the standard and the applicant did not meet the criteria set. A 3' discrepancy was acceptable but it was more than that. Michael Pallazola said that was not his perspective and that he had spent a lot of time with the Planning Board. The Planning Board set was a preliminary set and wasn't a full set because the applicant didn't know if it would be approved, according to Mr. Pallazola. Mr. Pallazola brought a full set of plans to the Building Department and he needed signatures from every department with the Planning Board having signed the building permit.

Bill Bowler didn't think the appeal process should include paying attention to information regarding anything other than the two points as other information was not germane to the Decision. The Planning Board disagreed with the Building Inspector's Decision that the elevator shaft was not for human occupation. Mr. Bowler did not think the Building Inspector was wrong on that point. Mr. Bowler suggested assuming the Building Inspector was correct about the human occupancy, and assume that the applicant put a spire on the roof for example, the language of the By-law would be clear, that it hadn't been shown on the drawing that was approved by the Planning Board. The spire would be within that exception, but in the Special Permit granting process, particularly under the overlay district that they could grant a waiver of the height restriction, knowing there might be a spire, might be important. Even if it didn't count against the height, it should have been shown on the drawing. Kim Dietel and John Rodenhizer found the elevator structure not to be on the plan entitled "Proposed Mixed Use Building 227 Willow St., dated September 13, 2013." The final plan in which the Planning Board granted the Special Permit, did not show the elevator shaft structure.

Michael Pallazola said he didn't know how large the elevator would be. John Rodenhizer said the floor plans indicated that when the roof was shown, the footprint of the elevator was doubled because there was more space than the actual elevator. Mr. Rodenhizer noted that the code did not change. Mr. Pallazola said he had spoken with Charlie Brett several times and recalled that when he went to the Fire Department, the Chief asked him to return with more information on fire alarms. Mr. Rodenhizer asked if the Planning Board had signed off on the Building Permit as it should have been picked up. The fourth floor stop did not show on the initial plan. Bruce Gingrich stated that one could not reasonably assume there would be an additional stop on the roof. Mr. Pallazola said there was always a stop on the roof.

After many meetings, the Planning Board came up with a mansard roof to make it look residential and a living roof with planting trays for rain retention, according to Michael Pallazola. A spiral stair and an elevator were shown on a floor plan. John Rodenhizer said the elevator core

was 1/3 the size of the elevator at the top. The primary reason for the elevator was to get equipment on and off the roof, according to Mr. Pallazola, who added that the spiral stairs were for his family to go up to the roof. The vestibule in the stairway was for his family access.

Michael Pallazola said the Planning Board wrote down 41' which wasn't true because they asked him to increase the mansard roof which increased it to 47'. The drawing showed the roof to 47', according to Mr. Pallazola. John Rodenhizer said the mansard would be plus or minus a foot, making it a difference of 3'. Mr. Pallazola said the By-law as written, had exemptions regarding the structure that was built, which was not devoted to human occupancy. Mr. Pallazola noted that Hamilton did not have a definition for occupy-able space, so he referred to Massachusetts code which referred to space devoted to eating, sleeping, or cooking as occupy-able space with exemptions for bathrooms, toilets, halls, utility spaces, which were similar spaces. There was discussion regarding the difference between occupy-able versus habitable spaces. Mr. Rosenhizer said the applicant should have had the change approved.

Bill Bowler said the Site Plan Review requirements for submittal would expect to see drawings for the elevator, to which John Rodenhizer and Bruce Gingrich agreed. The first point of discussion seemed vague to Mr. Bowler but the second point was considered in that if the elevator shaft structure had been shown, it might have affected how the Planning Board viewed the height waiver.

John Rodenhizer asked who signed the Building Permit. The Planning Board, in response to this Special Permit, would now ask that the final signature be brought back to the Planning Board to compare the final plans with the preliminary plans. Bill Bowler said there had been no communication by Town Counsel with the Zoning Board noting that she had changed her initial opinion.

Kim Dietel said Charles Brett signed the building permit and should have caught the difference between the preliminary set of plans and the building permit set of plans. The developer had marching orders and the design team developed plans from the Special Permit Approval, according to John Rodenhizer, who continued that the design team forgot that they had a Special Permit. The question for the Decision would be if this was a big enough hiccup that the ZBA should overturn the Building Inspector's Decision. John Rodenhizer thought the Building Inspector's Decision should be overturned and the Planning Board Decision should be enforced. According to Mr. Rodenhizer, the applicant disregarded what the Planning Board permitted. Michael Pallazola said changes to the Planning Board approved plans were a natural occurrence as it changed into a real project.

Bill Bowler asked the members if they had enough information to make a decision. Kim Dietel said she did not have enough information regarding the question of human occupancy. Michael Pallazola said one could not open an elevator into open space so there was a 5' room with a door before one went outside. Mr. Pallazola said there was no intent to go against the Planning Board

approval. Mr. Bowler noted that the ZBA had 14 days to write the Decision, file it with the Town Clerk with the statutory 20 day appeal period. If appealed, the Decision would go to land court. The ZBA could determine if the Cease and Desist, if voted upon, was just the elevator or the whole building.

Bill Bowler described the question as: “Does the Board of Appeals find that the elevator shaft which was constructed above the roof, fall within the exemption 5.B.9.B.1” Kim Dietel responded that she needed more information about how the courts defined human occupancy. John Rodenhizer stated that typically the elevator shaft on top of the roof usually housed the wheel, so when the elevator reached the top floor, it might stick up 2,3, or 4’, but this new drawing showed the car now stopped on the fourth floor, which wasn’t in the previous drawings. Bill Bowler said he would reiterate his position that he had not heard enough input such that he would vote to overturn the Building Inspector’s Decision on the first point. Mr. Bowler said he would vote that it fell within the exemption. The vote needed to be unanimous. Regarding the first issue, Mr. Bowler said he would vote to uphold the Building Inspector’s position.

The second question was if the Board would find that “the elevator shaft should have been shown on the schematic drawings submitted to the Planning Board on which they granted the Special Permit.” Bill Bowler said it was hard for him to see that it should not have been shown on the drawing. Kim Dietel wondered if it was the builder or the Building Inspector’s job to compare the plans. John Rodenhizer recalled the special condition that they had to design to the Special Permit approval and that it would have been the architect’s job to go back to the Planning Board. The Planning Board set the roof height to accommodate what to do and not overshadow the residential neighborhood. Michael Pallazola said it was not his responsible to go back to the Planning Board. Bill Bowler said Mr. Pallazola was wrong. Mr. Pallazola said he knew from day one that he was putting the elevator on top of the roof. Bill Bowler said he reviewed the minutes and there was nothing about the elevator.

The building official was allowed to be in error but it didn’t excuse the applicant from meeting the law, according to John Rodenhizer. Mr. Rodenhizer said he had a problem with points one and two and found the Planning Board was correct in their motion. A stop work order would not be appropriate for the entire building. An occupancy permit could not be issued with a Cease and Desist Order in place.

John Rodenhizer said he wished the applicant had followed the protocol and that disrespecting any board that gave him a Special Permit was inappropriate. Mr. Rodenhizer thought a Cease and Desist Order should be for the elevator as it sat. Mr. Rodenhizer thought the applicant should return to the Planning Board. Michael Pallazola said he would not return to the Planning Board.

Motion made by John Rodenhizer, based on the letter of January 20, 2017, the Planning Board requested that the Building Inspector issue a Cease and Desist Order based on the contention that

the elevator shaft violates the Zoning By-law. The Building Inspector declined to do so based on his contention that it came within the exemption contained in Zoning By-law Section V.I.9.B.1. Mr. Rodenhizer asked to strike “elevator shaft” and call it a “structure.” “The structure that contains in part an elevator shaft.”

Motion to overturn the finding of the Building Inspector with respect that contention was made by John Rodenhizer.

Seconded by Bill Bowler.

Vote: John Rodenhizer (aye), Bill Bowler (nay), and Kim Dietel (abstain, due to lack of information regarding the State definition of human occupancy).

Mr. Bowler announced that the Decision of the Building Inspector was upheld and was not overturned with respect to this issue.

Bill Bowler defined the second question as: “The Planning Board believed the structure was not consistent with the final schematics as it was not shown on the final schematics and therefore it violated the Special Permit as constructively granted. The Building Inspector declined to issue a Cease and Desist Order on that grounds.”

Motion to overturn the Building Inspector’s determination on that such that a Cease and Desist Order should be issued was made by John Rodenhizer with the condition that the Cease and Desist Order was only for the structure on the top of the building and that it did not hamper him from continuing the remaining portions of the building.

Seconded by Kim Dietel.

Vote: Bill Bowler (aye), John Rodenhizer (aye) and Kim Dietel (aye). Unanimous in favor.

Bill Bowler announced that the Decision of the Building Inspector was upheld in regard to the first point and overturned with respect to the second point. Mr. Bowler stated that he had fourteen days to file the Decision with the Town Clerk with a 20 day appeal period following.

#### Update from the Chair

#### Adjournment

Motion to adjourn made by Kim Dietel.

Seconded by John Rodenhizer.

Vote Unanimous to adjourn at 9:03 pm.

Prepared by:

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Marcie Ricker

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Attest

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Date